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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

MIRON FLORIN MARCU, PETITIONER,

v.

IMMIGRATION AND NATURALIZATION SERVICE, RESPONDENT.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the government can rebut the regulatory presumption of a well-founded fear of persecution (8 C.F.R. § 208.13(b)(1)(i)) triggered by proof of past persecution based solely on evidence of generalized changes in country conditions, and without any evidence pertaining to the alien, his social group, or whether the changes in country conditions affected the specific threat of persecution faced by the applicant.

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For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Miron Florin Marcu ("Marcu") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals (App., *infra*, 1a-24a) is reported at 147 F.3d 1078. The judgment of the Board of Immigration Appeals (App., *infra*, 25a-32a) is unreported. The decision of the immigration judge (App., *infra*, 33a-38a) is unreported.

JURISDICTION

The court of appeals entered its judgment on June 26, 1998. Marcu timely submitted a brief in support of rehearing *en banc* pursuant to the Ninth Circuit's August 13, 1998 order *sua sponte* requesting an *en banc* vote. App., *infra*, 39a.

Under Ninth Circuit law, this order was treated both as a petition for rehearing and a suggestion for rehearing *en banc*. See DOROTHY W. NELSON ET AL., CALIFORNIA PRACTICE GUIDE ¶ 11:22 (1997). The court thus *sua sponte* withheld issuance of its mandate pending disposition on rehearing. App., *infra*, 40a. Rehearing was denied on October 22, 1998, and the mandate issued on October 23, 1998. *Id.* The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).[1]

STATUTORY PROVISIONS INVOLVED

8 U.S.C. § 1101(a)(42) provides that "[t]he term 'refugee' means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . . ." 8 C.F.R. § 208.13(b)(1)(i) provides that "[i]f it is determined that the applicant has established past persecution, he or she shall be presumed also to have a well-founded fear of persecution unless a preponderance of the evidence establishes that since the time the persecution occurred conditions in the applicant's country of nationality or last habitual residence have changed to such an extent that the

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[1] Because the Ninth Circuit treated the suggestion for rehearing *en banc* as a petition for rehearing, the time for filing a petition for a writ of certiorari began to run on October 22, 1998. See SUP. CT. R. 13(3); *Missouri v. Jenkins*, 495 U.S. 33, 46-49 (1990) (time period for seeking certiorari was tolled where Eighth Circuit treated request for rehearing *en banc* as including a petition for rehearing by issuing its mandate only upon its denial of rehearing).

applicant no longer has a well-founded fear of being persecuted if he or she were to return."

STATEMENT

This case presents the important and recurring question of whether the government can rebut the presumptive well-founded fear of future persecution (8 C.F.R. § 208.13(b)(1)(i)) based solely on generalized changes in country conditions, and without any evidence to rebut an asylum applicant's specific showing that he was singled out for past persecution. A large body of refugee law, including decisions from other circuits, Immigration and Nationality Act ("INA") regulations, and international treaties, dictates that asylum determinations be based on facts specific to the particular applicant. Nonetheless, the Ninth Circuit concluded that, even though past persecution is shown only by evidence specific to the asylum applicant and cannot be shown based on country conditions alone, the *government* can rebut the regulatory presumption of future persecution simply by introducing *general* evidence of changes in country conditions.

The Ninth Circuit's decision squarely conflicts not only with the plain language of the INA and its regulations, but with decisions of the First, Seventh, and Eighth Circuits as well. This Court should grant the petition to address this unanswered question, and thus ensure the even-handed treatment of victims of persecution. Absent Supreme Court review, the government will not be held to the same — and correct — burden of proof nationwide in cases of past persecution. This creates the serious risk that, contrary to federal and international law, those who have suffered past persecution will be erroneously returned to the oppressive situations from which they have fled.

1. Miron Florin Marcu, a native and citizen of Romania, came to the United States seeking refuge from the years of persecution he and his family had endured at the hands

of the Romanian government. For nearly his entire life, Marcu and his family were victimized by the local authorities because of his mother's United States citizenship and his family's open loyalty to and affiliation with the United States, including the use of Marcu's family home as the United States diplomatic mission in Romania. Marcu's persecution stemmed from his membership in a particular social group — namely, his family — as a result of "his and his family's support for principles of American freedom."[2] App, *infra*, 12a. Marcu applied for asylum immediately after entering this country on a visitor's visa in 1990. After his application was denied, Marcu was placed in deportation proceedings. Marcu conceded deportability and once more applied for asylum and withholding of deportation. *Id.* at 14a. His application was again denied by the immigration judge and the Board of Immigration Appeals ("BIA").

2. Before the immigration judge, Marcu recounted specific, detailed occurrences of persecution by Romanian officials spanning more than 40 years. Marcu testified that his family's persecution began when a Communist dictatorship came into power in 1945. Initially, the government seized most of the family's wealth and property, except for its principal home. App., *infra*, 2a, 10a.

Beginning in 1946, the Marcu home served as an official U.S. diplomatic office that displayed the American flag, thus emphasizing the family's open association with the United States. *Id.* at 10a. When the American Consulate withdrew in 1949, the home, as well as the rest of the family's possessions, were confiscated. The family was forced to live in a small room, "'10 feet by 12 feet, with no facilities, no water, no

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[2] Persecution on account of group membership is one of the grounds for seeking asylum. 8 C.F.R. § 208.13(b)(1).

anything, only a room.'" *Id.* at 2a. Soon afterwards, the local police arrested, imprisoned, and tortured Marcu's mother for refusing to renounce her United States citizenship. Eventually, she was sentenced to a labor camp, from which she was released two years later. *Id.* at 10a-11a.

In addition to describing how local Romanian officials persecuted his family, Marcu provided specific evidence that the Romanian government singled him out personally for abuse due to his family affiliation and connections to the United States. Throughout his youth, Marcu was frequently removed from school and detained by the police. They questioned him about his family's views on the Romanian government and his own political beliefs, often referring to him in a derogatory fashion as an "American." App., *infra,* 11a.

Once Marcu finished his schooling, the detentions and interrogations continued, and the beatings began. The Romanian police beat Marcu for such acts as listening to Radio Free Europe and The Voice of America and wearing American-made blue jeans. They accused him of being an "enemy of the people" and an "instigator." App., *infra*, 12a. Marcu was repeatedly interrogated at the police station about listening to "subversive" radio programs, his contacts with American relatives who lived in the United States, and his attitude toward the Romanian government. *Id.* When these sessions ended, he was routinely beaten and threatened with death. *Id.* One particularly severe beating stretched over a period of 36 hours, when Marcu was arrested after being accused of inciting labor strikes. Before he was allowed to leave, he was ordered to write down everything he knew about his family. *Id.* These detentions and beatings, along with searches of Marcu's home, continued incessantly from the 1960's until the 1980's.

In the late 1980's, the Romanian government's targeted persecution of Marcu intensified. The police threatened to kill

him if he attempted to leave for the United States to be with his first wife (who had emigrated here and was granted asylum based on the persecution of Marcu's family). App., *infra*, 13a. On numerous occasions, he was pummeled with sand-filled socks. *Id.* Ultimately, such episodes escalated until the detentions and questionings happened nearly daily. *Id.*

After the fall of the Communist regime in 1989, Marcu's persecution did not stop. When, in 1990, the police learned that Marcu had applied for a U.S. visa, they summoned him to the local station, where they beat him until he was unconscious. They told him, "We take care of the enemy of the people. We take care, we shut their mouth. This means we kill them." App., *infra*, 3a. Marcu and his second wife finally managed (by surreptitious means) to leave for the United States in September, 1990, but the Romanian authorities' interest in him did not wane. His mother-in-law, who lives in his former house in Romania, testified that the police have continued to question her about Marcu and have warned her to sever all ties with him. Her house has also been broken into on several occasions.[3] *Id.* at 3a, 14a-15a.

3. In contrast to Marcu's evidence of past persecution, the INS introduced one piece of evidence: a Department of State Country Report on Romania and accompanying advisory opinion containing no information about Marcu or his family. App., *infra*, 15a-16a. In the advisory opinion, the Director of the Office of Asylum Affairs admitted that he had no "independent information" about Marcu himself or the persecution he had suffered before he left Romania. *Id.* at 42a.

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[3] Besides direct testimonial evidence, Marcu also submitted documents that supported his asylum claim, including excerpts from the Congressional Record, reports from Amnesty International, and current American newspaper articles. App., *infra*, 14a, 17a-20a.

Nonetheless, the BIA decided that the government's evidence, which merely described the "democratic changes" in Romania since 1989 (and noted that pockets of persecution still exist), alone justified denying Marcu asylum. *Id.* at 30a-31a. Although the BIA acknowledged that Marcu's abuse at the hands of the Romanian government and local officials "might rise to the level of persecution," it held that even if Marcu had demonstrated past persecution, the INS had effectively rebutted the presumption of a well-founded fear of future persecution. *Id.* at 29a.

4. The Ninth Circuit affirmed, holding that the State Department country report and advisory opinion by themselves "provided substantial evidence for the BIA's determination that the INS successfully rebutted the presumption of future persecution." App., *infra*, 7a. The court described the burdens of proof in an asylum case:

> If an applicant demonstrates that he has suffered past persecution, a rebuttable presumption of a well-founded fear of future persecution will be triggered. See 8 C.F.R. § 208.13(b)(1)(i). The INS can rebut this presumption by showing, by a preponderance of the evidence, that conditions "have changed to such an extent that the applicant no longer has a well-founded fear of being persecuted if he or she were to return."

Id. at 4a. By accepting the State Department documents as sufficient to deny Marcu asylum, the Ninth Circuit interpreted this regulatory formulation as permitting the government to meet its burden of proof simply by setting forth evidence of generalized changes in country conditions, without any regard for whether those changes have any bearing on the applicant's particular circumstances.

5. Judge Hawkins dissented, reprimanding the majority for "break[ing] new ground by elevating the State Department's country report to talismanic heights and shifting decision-making authority from the BIA to a government bureaucrat," and because neither the report nor the Director's analysis contained any information specific to Marcu himself or the persecution that he had suffered due to his family's historic affiliation with the United States. App., *infra*, 15a, 22a-23a. He explained:

> The BIA's analysis does not address Marcu's claim that he has a well-founded fear of persecution from local authorities whom the national government is unable or unwilling to control. Marcu has repeatedly argued, and submitted overwhelming evidence to prove, that while the changes on the national level in Romania have been fundamental, local governments are unchanged. It was the local police who primarily tormented his family for 45 years. The State Department's report simply does not rebut the presumption that Marcu has a well-founded fear of persecution from local authorities.

Id. at 23a.[4]

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[4] The majority indicated that it considered the Department of State's report to be "individualized" to Marcu's situation merely because the report made mention of his asylum application. App, *infra*, 6a. That characterization is meaningless, however, since the State Department openly admitted that it had no "independent information" about Marcu or his circumstances. *Id.* at 42a. Under the INA and its regulations, such lack of specificity in the government's evidence is controlling. In fact, the First Circuit has observed that the *very same language* that the Director used in his letter concerning his basis for evaluating Marcu's claim made "clear that the [State] Department was operating from generalized information." *Gailius v. INS*, 147 F.3d 34, 41-42 (1st Cir. 1998).

REASONS FOR GRANTING THE PETITION

I. THE NINTH CIRCUIT'S HOLDING THAT EVIDENCE OF GENERAL CHANGES IN COUNTRY CONDITIONS ALONE CAN OVERCOME THE REGULATORY PRESUMPTION OF A WELL-FOUNDED FEAR OF FUTURE PERSECUTION BASED ON PROOF OF PAST PERSECUTION CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS.

The court of appeals' decision in this case raises a question that is fundamental to the administration of federal asylum law: whether the government's burden to rebut the presumptive well-founded fear of persecution, triggered by an asylum applicant's showing of past persecution, can be met solely by evidence of generalized changes in country conditions. This Court has never considered the nature or extent of the government's burden of proof under 8 C.F.R. § 208.13(b)(1)(i). Nor has the Court ever considered whether the government can meet its burden of proof by relying solely on generalized changes in country conditions when the alien establishes that he and his particular social group were singled out for past persecution. The circuits are split on this recurring issue, and Supreme Court review is essential to bring needed clarity and consistency to this important area of the law.[5]

Under Section 208 of the INA, 8 U.S.C. § 1158, the Attorney General has the discretion to grant asylum to an alien

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[5] Of course, in determining whether the Ninth Circuit's ruling was correct, the ultimate issue is whether there is substantial evidence in the record as a whole to support the BIA's denial of asylum. See *INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992). However, petitioner is not simply asking this Court to decide if the Ninth Circuit appropriately weighed the evidence under that standard. Rather, the question presented for review involves the separate consideration of what *type* of evidence the government must produce to rebut the regulatory presumption of future persecution.

who is unable or unwilling to return to his home country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion," 8 U.S.C. § 1101(a)(42). As the Ninth Circuit explained, the sequence of proof in an asylum case is explicitly set forth in the INA regulations. Under the regulations, if an applicant proves past persecution, this triggers a rebuttable presumption that he possesses a well-founded fear of future persecution. 8 C.F.R. § 208.13(b)(1)(i). The burden then shifts to the government to establish, by a preponderance of the evidence, that the conditions in the applicant's country have changed to such a degree that his fear of persecution is no longer well-founded. *Ibid.* The Ninth Circuit's conclusion that the government can satisfy this burden based solely on general country condition changes without any evidence of how those changes impact the applicant's particular threat of persecution, is squarely contrary to other circuits' focus on the alien's specific situation.

In a factually indistinguishable case, the First Circuit recently held that, as a matter of law, evidence of changed country conditions alone is insufficient to rebut the presumption of future persecution triggered by 8 C.F.R. § 208.13(b)(1)(i). *Fergiste v. INS*, 138 F.3d 14, 19 (1st Cir. 1998).[6] In *Fergiste*, the asylum applicant proved that he was a victim of political persecution by presenting specific evidence of detentions, threats, and beatings by a paramilitary group that had protected the government dictatorship. *Id.* at 17, 18. As in the present case, the only evidence supporting a denial of asylum was a

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[6] The *Fergiste* court first held that the BIA had erred in failing to apply the rebuttable presumption of future persecution at all. *Id.* at 19. Then, "accepting the INS's argument that the [BIA] implicitly applied a presumption of future persecution," the court considered the adequacy of the government's evidence. *Id.*

Department of State country report and advisory opinion. See *id.* at 19. The First Circuit discounted those documents and found Fergiste statutorily eligible for asylum because there had been no evaluation of "how or whether [his] particular situation may be affected by the changed country conditions" that had swept over most of Haiti due to the restoration of a democratic government. *Ibid.* The First Circuit cautioned that "[a]bstract 'changed country conditions' do not automatically trump the specific evidence presented by the applicant." *Ibid.*

The specificity that the First Circuit insisted upon in the government's rebuttal evidence would plainly lead to a different result in this case. Like Fergiste, Marcu testified to countless specific instances of government-sponsored abuse. And the two documents relied on by the INS, *i.e.*, the State Department's Country Report and Advisory Opinion, contained no evidence that any changes in Romania's country conditions eliminated the specific threat of persecution to Marcu and his family from local authorities. All that the INS submitted was information about general developments since the overthrow of the Communist regime — precisely the sort of untailored evidence the First Circuit admonished does "not suffice to show that [the applicant] himself no longer [has] a reasonable fear of future persecution." *Fergiste*, 138 F.3d at 19. See also *Gailius v. INS*, 147 F. 3d 34, 36 (1st Cir. 1998) (citing *Fergiste*); *de la Llana-Castellon v. INS*, 16 F.3d 1093, 1097-98 (10th Cir. 1994) (discussion of change in government did not amount to particularized consideration of applicant's circumstances).

Other circuits have also ruled that asylum determinations cannot turn on generalized country conditions alone, thus conflicting with the Ninth Circuit's holding in this case. For instance, in *Bevc v. INS*, 47 F.3d 907 (7th Cir. 1995), the evidence offered by the applicant to establish a well-founded fear of persecution was virtually identical to that introduced by the government here to disprove a well-founded fear of

persecution. The Seventh Circuit held that the applicant's submission of a State Department advisory opinion and newspaper articles that each described "general conditions of unrest" in her homeland were insufficient to justify a grant of asylum. *Id.* at 910-11. Similarly, in *Hamzehi v. INS*, 64 F.3d 1240 (8th Cir. 1995), the Eighth Circuit held that the applicants' heavy reliance on a general State Department country report, coupled with their vague hearing testimony, did not show "the sort of particularized threat of severe harm that would support a well-founded fear of persecution." *Id.* at 1244.

Although these cases concerned an alien's burden of proof under the INA, they cannot be reconciled with the Ninth Circuit's decision below. If an alien seeking to demonstrate a well-founded fear of persecution cannot rely solely on evidence of general disarray in his homeland, it follows as a matter of law that the government must point to more than generalized country condition changes to rebut an applicant's presumptively well-founded fear of persecution. *Bevc*, 47 F.3d at 910. See also, *e.g.*, *Figeroa v. INS*, 886 F.2d 76, 80-81 (4th Cir. 1989) (general strife in country does not, in itself, support claim for asylum); *Mikhael v. INS*, 115 F.3d 299, 304 (5th Cir. 1997) (same); *Feleke v. INS*, 118 F.3d 594, 598-99 (8th Cir. 1997) (same). By accepting as rebuttal a general description of conditions in Romania, the Ninth Circuit rejected that precept and thereby improperly lowered the INS's burden of proof.[7]

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[7] Because, as discussed in more detail below, the government's burden must be commensurate with that which the alien has met, the court of appeals' holding also overlooks the significance of some of its own precedents. The Ninth Circuit has agreed that an alien cannot premise his application on "general societal conditions" without evidence of particularized persecution. *Singh v. INS*, 134 F.3d 962, 969 (9th Cir. 1997). See also *Prasad v. INS*, 101 F.3d 614, 617 (9th Cir. 1996). The Seventh Circuit is arguably plagued by the same confusion. Despite its

It is readily apparent that by creating inconsistency in federal asylum law, this split of authority seriously prejudices candidates for asylum. The erratic application of the regulatory burden-shifting scheme comes at an especially high price: it results in the unfair treatment of precisely those whom the laws should be most concerned about protecting — those who have already proven themselves to be the victims of past persecution and nonetheless may be deported back into the hands of their persecutors. Once those applicants are returned to their home countries, there is nothing this Court (or any other) can do for them. This conflict thus requires immediate resolution by the Court in order to prevent the unwarranted return of asylees to intolerable conditions in their native lands.

II. THE NINTH CIRCUIT'S DECISION IRRECONCILABLY CONFLICTS WITH THE FEDERAL AND INTERNATIONAL LEGAL REQUIREMENT THAT ASYLUM DETERMINATIONS BE BASED ON THE APPLICANT'S INDIVIDUAL CIRCUMSTANCES.

Under both federal and international law, the core of an asylum determination is the individualized evaluation of the applicant's particular circumstances. See, *e.g.*, *Figeroa*, 886 F.2d at 80; *Feleke*, 118 F.3d at 598; Katherine J. Strandburg, *Official Notice of Changed Country Conditions in Asylum Adjudication: Lessons From International Refugee Law*, 11 GEO. IMMIGR. L. J. 45, 60 (1996). This ensures that each applicant's eligibility for asylum is fairly and completely assessed and that only those truly deserving of refuge will

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holding in *Bevc* and other cases, in *Vaduva v. INS*, 131 F.3d 689 (7th Cir. 1997), it found that a State Department report and advisory opinion which indicated that Romania had become a democracy rebutted the applicant's fear of persecution due to his membership in the pro-democracy National Liberal Party. Such incoherence and unpredictability in the courts of appeals when dealing with burdens of proof that are expressly laid out in INA regulations calls for review by this Court.

receive protection. The Ninth Circuit's holding that general evidence was sufficient for the government to meet its burden of proof and to deny the petitioner asylum runs afoul of this common-sense approach. The court of appeals' disregard of this basic principle of asylum law constitutes reversible error and justifies review by this Court in order to settle the question of the government's burden in cases of past persecution.

First, and most importantly, the Ninth Circuit's decision is contrary to the plain language of the INA regulations. Once an alien has established past persecution, the regulations require the government to prove that "since the time the persecution occurred conditions in the applicant's country . . . have changed to such an extent that *the applicant no longer has a well-founded fear of being persecuted* if he or she were to return." 8 C.F.R. § 208.13(b)(1)(i) (emphasis added). The meaning of this provision is plain: the government must show not only that changes in country conditions have occurred, but that those changes negate *the applicant's* particular fear of persecution. In this case, the INS's evidence utterly failed to meet that standard. The country report and advisory opinion did not contain any evidence either concerning the specific persecution suffered by Marcu and his family because of their long-standing affiliation with the United States, or indicating that the threat of such persecution in the future would cease as a result of changes in country conditions. The State Department even acknowledged that it had no evidence about Marcu's specific experience of persecution.

By relieving the government of its burden to offer such particularized evidence, the Ninth Circuit's opinion eviscerates the INA's emphasis on the *applicant's* well-founded fear. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 428 (1987) ("[T]he 'persecution or well-founded fear of persecution' standard governs the Attorney General's determination whether an alien is eligible for asylum."). The Ninth Circuit's decision instead

allows changed country conditions alone to control asylum eligibility. However, the fact that country conditions have changed, or that repressive governments have been ousted, may or may not have any bearing on the particular threat of persecution faced by a given alien. The regulation itself recognizes this by mandating more than a showing of widespread changes in a country to deny asylum to a victim of past persecution. Indeed, it is well-established that an alien may possess a well-founded fear of persecution in his homeland despite sweeping changes in the government. Such aliens still remain eligible for asylum precisely because it is their fear of persecution that is ultimately dispositive. See, *e.g.*, *Fergiste v. INS*, 138 F.3d 14 (1st Cir. 1998) (alien was eligible for asylum based on fear of continued future persecution by paramilitary group which had supported ousted government; persecution by group persisted with change in government); *Kaczmarcyzk v. INS*, 933 F.2d 588, 594-95 (7th Cir. 1991) (changed political circumstances in Poland did not allow the BIA "to deny automatically every asylum application submitted by a Polish alien;" the changes might be "inapplicable or of limited probative value in individual cases"); *Vallecillo-Castillo v. INS*, 121 F.3d 1237 (9th Cir. 1997) (alien eligible for asylum even though government responsible for past persecution was no longer in power; alien still had reason to fear similar persecution in the future).

Demanding specificity from the government in its rebuttal evidence beyond generic recitals of changed country conditions also properly corresponds with the requirements that applicants must meet in order to demonstrate their eligibility for asylum in the first place. Courts have uniformly rejected asylum applications where an alien rests his claim of well-founded fear solely on the existence of turmoil, violence, or economic deprivation that affects the population of his country as a whole. See, *e.g.*, *M.A. v. INS*, 899 F.2d 304, 314-15 (4th Cir. 1990);

Mikhael v. INS, 115 F.3d 299, 304 (5th Cir. 1997); *Bradvica v. INS*, 128 F.3d 1009, 1012-13 (7th Cir. 1997); *Milosevic v. INS*, 18 F.3d 366, 373 (7th Cir. 1994); *Feleke v. INS*, 118 F.3d 594, 598-99 (8th Cir. 1997); *Safaie v. INS*, 25 F.3d 636, 641 (8th Cir. 1994); *Singh v. INS*, 134 F.3d 962, 967 (9th Cir. 1998); *Prasad v. INS*, 101 F.3d 614, 617 (9th Cir. 1996). A necessary corollary to this accepted rule is that to refute the alien's well-founded fear, the government cannot simply rely on widespread improvements in country conditions that appear to benefit the general populace.

Basic evidentiary principles confirm that the extent of the government's burden must be a function of the evidence of past persecution that the alien has adduced. In other contexts, courts have indicated that specific evidence can only be successfully rebutted by equally specific, responsive evidence to the contrary. See, *e.g.*, *Anderson v. Stauffer Chemical Co.*, 965 F.2d 397, 403-04 & n.2 (7th Cir. 1992) (plaintiff's contention that he generally performed his job satisfactorily did not rebut employer's specific reasons for discharge); *Menzel v. Western Auto Supply Co.*, 848 F.2d 327, 330 (1st Cir. 1988) (in employment discrimination case, "'where a company advances specific reasons for a discharge, the plaintiff's rebuttal evidence should be focused on those reasons."') (citations omitted); *Bell v. AT&T*, 946 F.2d 1507, 1512 (10th Cir. 1991) (same). Therefore, it is impermissible to allow the government to overcome an alien's specific evidence of past persecution with generalized evidence of changed country conditions. Since the asylum applicant must present direct, particularized evidence that he (or his social group) has been targeted for abuse in order to demonstrate past persecution, the government's shifted burden of proof must itself require the same level of specificity. See, *e.g.*, *Marquez v. INS*, 105 F.3d 374, 379 (7th Cir. 1997) (aliens need to present "specific facts" to support the inference of past persecution); *Draganova v. INS*, 82 F.3d 716, 720-21

(7th Cir. 1996) (same); *Refahiyat v. INS*, 29 F.3d 553, 556 (10th Cir. 1994) (same); *Meza-Manay v. INS*, 139 F.3d 759, 764-65 (9th Cir. 1998) (specific instances of political persecution warranted finding of past persecution).

Unless the government's burden of proof under 8 C.F.R. § 208.13(b)(1)(i) tracks that which the alien must meet in order to trigger the presumption of a well-founded fear of persecution, the regulatory framework created by the Attorney General will be eviscerated. Absent an equivalent burden of proof, the government's evidence can hardly be considered contradictory enough to overcome, let alone by a preponderance of the evidence, the alien's showing of persecution and the legal presumption of a well-founded fear of future persecution.

The Ninth Circuit's decision also conflicts with international law as set forth in the United Nations Convention and Protocol on the Status of Refugees (the "Convention"). Under the Convention, as under the INA regulations, an asylum application may be denied due to changed circumstances only if country conditions have changed in a way that specifically alters the circumstances that gave rise to the applicant's earlier persecution. See United Nations Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, art. 1(C)(5), 19 U.S.T. 6259, 6262; Strandburg, *supra*, at 62.

As a signatory to the Protocol, the United States is, of course, directly bound by this portion of the Convention. See United Nations Protocol Relating to the Status of Refugees, *opened for* signature Jan. 31, 1967, art. I(2), 19 U.S.T. 6223, 6225; INS *v. Cardoza-Fonseca*, 480 U.S. 421, 436-38 & n.21 (1987) (Protocol incorporates the relevant provisions of the Convention regarding who qualifies as a refugee). The Ninth Circuit's failure to require particularized evidence of changed country conditions is thus plainly inconsistent with a critical United States treaty obligation. The Ninth Circuit's error also

is compounded by the fact that Congress intended to conform federal asylum law to the Convention. *Cardoza-Fonseca*, 480 U.S. at 432-33, 436-40. Such a serious disjunction between the court of appeals' decision and international law merits review by this Court.

III. THE NATURE OF THE GOVERNMENT'S BURDEN OF PROOF IN CASES OF PAST PERSECUTION IS OF GREAT PRACTICAL AND LEGAL IMPORTANCE

As a nation of immigrants, the United States has a long tradition of providing safe haven to those fleeing persecution. See S. Rep. No. 256, 96th Cong., 1st Sess., at 24 (1979), *reprinted in* 1980 U.S.C.C.A.N. 141, 141; Mary McGee Light, *The Well-Founded Fear Standard in Refugee Asylum: Will It Still Provide Hope for the Oppressed?*, 45 DRAKE L. REV. 789, 790 (1997). The uniform, fair treatment of potential asylees under the INA is vital to carrying out that tradition. But unless the government is held to a single burden of proof, as articulated in the INA regulations, applicants will be deprived of a meaningful opportunity to establish their eligibility for asylum. A case-by-case assessment of asylum claims — including requiring the government to demonstrate how changed country conditions impact an applicant's specific fear — is the only way to ensure that requests for asylum are handled in accordance with the humanitarian goals of both federal and international law. See S. Rep. No. 256, *supra*, at 24, *reprinted in* 1980 U.S.C.C.A.N. at 141 (refugee act was intended to give "statutory meaning to our national commitment to human rights and humanitarian concerns"); Shelley M. Hall, *Quixotic Attempt? The Ninth Circuit, the BIA, and the Search for a Human Rights Framework to Asylum Law*, 73 WASH. L. REV. 105, 106-109 (1998) (stressing need to construe asylum law in keeping with its humanitarian purpose). Anything less risks erroneous deportations, and the erroneous denial of asylum.

The serious consequences associated with the confusion in the lower courts about allocating the government's burden are underscored by the fact that the government only needs to present rebuttal evidence under 8 C.F.R. § 208.13(b)(1)(i) once "the applicant has established past persecution." *Id.* Hence, in deciding whether the government has met its rebuttal burden, courts are determining the fate of those who have actually suffered persecution yet may nonetheless be returned to their oppressors. Uncertainty and inconsistency when dealing with the fate of these victims of persecution cannot be countenanced and should be remedied by this Court. As the Court itself has previously acknowledged, "[d]eportation is always a harsh measure; it is all the more replete with danger when the alien makes a claim that he or she will be subject to death or persecution if forced to return to his or her home country." *Cardoza-Fonseca*, 480 U.S. at 449.

The practical significance of the issue presented by this case can hardly be overstated. The question of what burden of proof the government must meet in order to defeat an applicant's showing of past persecution frequently recurs and impacts a large group of people. According to INS statistics, more than 128,000 asylum cases were filed or reopened in 1996 alone. U.S. IMMIGRATION AND NATURALIZATION SERVICE, 1996 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE (U.S. Government Printing Office: Washington D.C., 1997). And because governments alter their human rights practices, or their attitudes towards other groups' violations of human rights, evidence of changed country conditions is often a crucial factor in determining asylum eligibility. See Strandburg, *supra*, at 45. Valuable judicial, administrative, and private resources will continue to be wasted on litigating over the effect of such evidence absent clarification from this Court. Moreover, the need to resolve the extent of the government's burden is all the more immediate and

compelling given that many asylum applicants are in deportation proceedings — or will soon be subject to such proceedings.

This Court has never addressed the government's burden under 8 C.F.R. § 208.13(b)(1)(i). Doing so now is imperative to prevent further injustice to asylum applicants.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 1999

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MIRON FLORIN MARCU, Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

No. 96-70881.

June 26, 1998.

John R. Alcorn, Susan E. Schultz, Lois S. Laughlin, Law Offices of John R. Alcorn, Newport Beach, California, for the petitioner.

Nelda C. Reyna, Office of Immigration Litigation, Civil Division, Department of Justice, Washington, DC, for the respondent.

Petition for Review of an Order of the Board of Immigration Appeals. INS No. A70-046-326.

Before WALLACE, TROTT, and HAWKINS, Circuit Judges.

Opinion by Judge WALLACE; Dissent by Judge MICHAEL DALY HAWKINS.

WALLACE, Circuit Judge:

Miron Florin Marcu, a citizen of Romania, petitions for review of the Board of Immigration Appeals' (BIA) denial of his application for asylum and withholding of deportation. We have jurisdiction to hear this petition pursuant to 8 U.S.C. § 1105a(a), and we deny the petition.

Because this petition was filed prior to the effective date of the Illegal Immigration Reform and Immigrant Responsibility

Act of 1996, Pub. L. No. 104- 208, 110 Stat. 3009-546, we do not apply its provisions regarding the scope of judicial review. See *Kalaw v. INS*, 133 F.3d 1147, 1150 (9th Cir.1997).

I

We present the facts as accepted by the BIA, which were based on the immigration judge's findings. Marcu was born in 1942 in Romania, to a Romanian father and a mother who was a United States citizen. He asserts that his mother's citizenship was the cause of Romanian government persecution.

When a communist regime took control of the Romanian government in 1945, most of Marcu's family's possessions were confiscated. The family managed to keep its main home, which also served as an office of the United States Department of State. This office, known as the "United States legacy," remained in place until 1949, after which the Romanian government put "pressure against [his family]."

The government then moved Marcu's family into "a small room, 10 feet by 12 feet, with no facilities, no water, no anything, only a room." Marcu's mother was detained by local police, who sought her renunciation of her U.S. citizenship. When she refused to do so, she was imprisoned.

As a child, Marcu was taunted by other children due to his mother's ties to the United States. When he finished high school, he applied to a university, but his application was lost repeatedly, and he ultimately settled for attending a technical trade school. At the trade school, a teacher denounced him as an "enemy of the people."

Marcu was interrogated by police and beaten in 1964 for listening to Radio Free Europe and in 1968 for wearing jeans made in the United States. In 1970 and in the early 1980s, he was detained and questioned by the police a number of times

and his home was searched repeatedly. Although his first wife was allowed to emigrate to the United States in 1984, he was denied permission to visit her. They were later divorced.

In 1990, Marcu applied again for a visa to visit the United States. Local police detained him, beat him to the point of unconsciousness, and threatened him: "We take care of the enemy of the people. We take care, we shut their mouth. This means we kill them."

After Marcu arrived in the United States with his second wife, local police came to his Romanian house and questioned his mother-in-law about his visit and his anticipated return date. The police also warned her to disassociate herself from Marcu because of his ties to the United States.

Marcu has conceded deportability and the only issues are whether he should be granted asylum or have his deportation withheld. The immigration judge assigned to the case held a hearing on December 21, 1993, at which time Marcu and the Immigration and Naturalization Service (INS) presented evidence. On March 14, 1994, the immigration judge denied relief. Marcu appealed to the BIA, which affirmed the immigration judge on September 24, 1996, holding that Marcu was not eligible for asylum because he did not have a well-founded fear of future persecution, given the massive governmental changes in Romania in the past decade.

II

Marcu first petitions for review on the ground that the BIA's determination of ineligibility for asylum is not supported by substantial evidence. Our review of the BIA's determination of ineligibility for asylum is extremely narrow. That determination must be upheld if "supported by reasonable, substantial, and probative evidence on the record considered as a whole." 8 U.S.C. § 1105a(a)(4). This is a highly deferential

standard of review. "To reverse the BIA finding we must find that the evidence not only *supports* that conclusion, but *compels* it . . . ." *INS v. Elias-Zacarias*, 502 U.S. 478, 481 n.1, 112 S.Ct. 812, 117 L.Ed.2d 38 (1992) (emphasis in original).

"To establish eligibility on the basis of a 'well-founded fear of persecution,'" Marcu must demonstrate both an objectively reasonable and subjectively genuine fear. *Fisher v. INS*, 79 F.3d 955, 960 (9th Cir. 1996) (en banc) (*Fisher*). If an applicant demonstrates that he has suffered past persecution, a rebuttable presumption of a well-founded fear of future persecution will be triggered. See 8 C.F.R. § 208.13(b)(1)(i). The INS can rebut this presumption by showing, by a preponderance of the evidence, that conditions "have changed to such an extent that the applicant no longer has a well-founded fear of being persecuted if he or she were to return." *Id.*

In this case, the BIA appeared to assume that Marcu had demonstrated subjectively genuine fear of future persecution. It held, however, that he had failed to demonstrate objectively reasonable fear of such persecution and thus was not eligible for asylum.

We must determine whether the evidence present in this record *compels* reversal of the BIA's determination of ineligibility. That is the only issue before us. It was unnecessary for the BIA to discuss the finding of the immigration judge that Marcu had suffered harassment and discrimination, but had failed to prove these acts to be government persecution. The reason the BIA did not need to make a finding on whether Marcu had demonstrated past persecution was because even if past persecution were demonstrated, triggering a presumption that Marcu has a well-founded fear of future persecution, 8 C.F.R.

§ 208.13(b)(1)(i), the BIA found that the INS had rebutted the presumption successfully.

Like the BIA, we need not decide whether Marcu suffered government persecution or merely some police harassment, mistreatment, etc. that is discriminatory but not official government persecution. See *generally Fisher*, 79 F.3d at 961. We assume for purposes of our decision that Marcu has shown past persecution, and proceed to determine whether there is substantial evidence in the record to support the BIA's conclusion that the INS successfully rebutted the presumption of future persecution.[1]

In holding that the presumption was rebutted, the BIA relied primarily on a letter from the United States Department of State, signed by Roger Dankert, Director of the Office of Asylum Affairs in the Bureau of Human Rights and Humanitarian Affairs. Director Dankert made his own analysis and enclosed a four-page report prepared by the Bureau that described the sweeping changes that had occurred in Romania since the overthrow of Ceausescu. According to that report, "current conditions have so altered as to remove any presumption that past mistreatment under Ceausescu or in the chaotic first year after his overthrow will lead to mistreatment in the future." We have previously described these country reports as "'the most appropriate and perhaps the best resource' for 'information on political situations in foreign nations.'" *Kazlauskas v. INS*, 46 F.3d 902, 906 (9th Cir. 1995), *quoting Rojas v. INS*, 937 F.2d 186, 190 n.1 (5th Cir. 1991). This

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[1] Because we assume that Marcu has suffered past persecution, it is unnecessary to recount all of the details of his life, as the dissent does. The dissent's additions neither strengthen our assumption of past persecution nor shed any light on the relevant issue in this case, which is whether the INS has successfully rebutted the presumption of *future* persecution.

makes sense because this inquiry is directly within the expertise of the Department of State.

Based on this letter and enclosed report, the BIA concluded that, while Marcu may have suffered from past persecution during the communist regime, the conditions had changed sufficiently so that he no longer had a well-founded fear of persecution. The report provides substantial support for this conclusion. Although Marcu was detained and beaten by police agents in 1990, this incident — the first such incident in several years — occurred during the "chaotic first year" mentioned in the report. There are no alleged abuses after that time, which is completely consistent with the Department of State report.[2]

Moreover, the Department of State report was individualized to Marcu's situation. Director Dankert's letter stated that the Department's conclusions were based on an "analysis of country conditions and other relevant factors, plus an evaluation of the specific information provided in the application." Based on this, he stated:

> The applicant is not correct in stating that there has been "no real change in the Romanian Government" since he left. He is also incorrect in stating that his U.S. connections would be a basis for retribution against him. We see no reason why the

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[2] The dissent contends that the BIA ignored part of the Country Report that states that "most plausible mistreatments cited by applicants are now local rather than national authority in origin." What the dissent does not quote is the next clause, which states that such mistreatment "can be averted . . . by recourse to the nascent democratic legal structures rather than by recourse to seeking political asylum abroad."

applicant could not reside tranquilly in Romania.

Director Dankert's analysis thus provides substantial support for the BIA's determination that the INS had rebutted the presumption of future persecution. Indeed, as the BIA pointed out in its opinion, the documentary evidence Marcu submitted in some ways confirms the country report's observation that the conditions in Romania have changed noticeably. See, *e.g.*, *International Human Rights Law Group*, cited in 139 Cong. Rec. S14220 (daily ed. Oct. 21, 1993) ("The Law Group is pleased to note that the human rights situation in Romania has improved during the past year in several respects."); *Helsinki Watch*, cited in 139 Cong. Rec. S14218 (daily ed. Oct. 21, 1993) ("Although there have been significant improvements in many areas of concern to the Hungarian minority in Romania, tensions have remained high . . . .").

As the briefs filed in this case demonstrate, there is a factual dispute regarding the current conditions in Romania. We do not solve this dispute. Our task is to determine whether there is substantial evidence to support the BIA's finding, not to substitute an analysis of which side in the factual dispute we find more persuasive. As we have already held that the country report from our Department of State is "the most appropriate" and "perhaps the best resource," we hold that the country report and Director Dankert's analysis provided substantial evidence for the BIA's determination that the INS successfully rebutted the presumption of future persecution.

III

Marcu petitions for review on the alternative ground that he should be deemed eligible for asylum based solely on past persecution. In certain circumstances, the BIA may grant

asylum for humanitarian reasons, based on past persecution alone, without the need for a showing of likelihood of future persecution. See *Acewicz v. INS*, 984 F.2d 1056, 1062 (9th Cir. 1993), *citing Matter of Chen*, 20 I. & N. Dec. 16 (BIA 1989). The BIA based this possibility on the Handbook of Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees. *Matter of Chen*, 20 I. & N. Dec. at 19. There, reference was made to the circumstances of "a person who — or whose family — has suffered under atrocious forms of persecution should not be expected to repatriate." *Id.* Asylum may be considered in such cases even when there is little threat of future persecution. *Id.*

With regard to this claim, the BIA held: "[B]ased on the evidence at hand, we do not find sufficient humanitarian grounds to grant the respondent asylum as a matter of discretion. The actions were not so severe or atrocious in nature to warrant asylum for humanitarian reasons."

Although we require more than a mere comment from the BIA, "all that is necessary is a decision that sets out terms sufficient to enable us as a reviewing court to see that the Board has heard, considered, and decided." *Rodriguez-Matamoros v. INS*, 86 F.3d 158, 160 (9th Cir. 1996), *quoting Villanueva-Franco v. INS*, 802 F.2d 327, 330 (9th Cir. 1986).

The BIA set forth in its opinion an extensive description of the harassment and abuse Marcu endured during his time in Romania. In the BIA's judgment, however, that harassment and abuse did not rise to the necessary level of severity or atrociousness to warrant asylum on humanitarian grounds. The BIA's opinion demonstrates that it heard the claim, considered the evidence, and decided against Marcu. No more was required. Therefore, we hold that the BIA did not abuse its

discretion in holding that Marcu was not eligible for asylum based solely on past persecution.

IV

Because we hold that Marcu has not demonstrated that the evidence presented to the BIA would compel a finding that he was eligible for asylum, we hold that he is not entitled to the withholding of deportation. See *Berroteran-Melendez v. INS*, 955 F.2d 1251, 1258 (9th Cir. 1991).

PETITION DENIED.

HAWKINS, Circuit Judge, dissenting:

I must dissent. Miron Florin Marcu ("Marcu"), the son of a United States citizen, was persecuted for over 45 years by local Romanian officials because of his loyalty to and identification with the United States. The persecution began when the Iron Curtain descended over Central and Eastern Europe and continued well after the collapse of the Communist regime in Romania. When Marcu sought asylum in this country, the INS presented only the barest defense: it asked not a single question of Marcu or his witness, it presented no witnesses to contradict Marcu's detailed and corroborated testimony, and it introduced no documentary evidence other than a State Department cover letter and four-page country report. Even this report conceded that persecution of the type experienced by Marcu persists in local areas of Romania.

I.

Because the majority's description of the facts omits or downplays many of the significant events in Marcu's life, I recount them here, as they were received in uncontradicted fashion.

Marcu's mother, Florence Sebatini, was born and raised in the United States. When Florence was fourteen, the family moved to Romania. An older sister, Margaret Darin, remained in the United States and currently lives in Florida. Margaret provided substantial financial and emotional support to Marcu and his mother throughout the years. Marcu was born in Romania in 1942.

In 1945, a Communist dictatorship came to power in Romania. The government expropriated most of the family's wealth and property, except for the family home in Constanta.

In 1946, Florence contracted with the U.S. State Department to establish a "U.S. Legation," a small diplomatic office of the U.S. embassy, in the family home. Thus, the Marcu home displayed the American flag and bore the diplomatic emblem of the United States. Marcu's father died in 1947. When the American Consulate left in 1949, the Romanian government confiscated the home and the family's remaining possessions. Marcu, his mother, and his grandmother then lived in a small room with no light, facilities, or water.

On many occasions, Florence was detained, interrogated, and pressured to renounce her U.S. citizenship by local police. In April 1950, the police accused her of being an American spy and arrested and imprisoned her without a trial. She was hung upside down for hours and forced to engage in degrading acts. Continually questioned about being an American spy, she was sentenced to field labor at the working camps of Popesti Leordeni prison. Finally, at gunpoint, Florence renounced her U.S. citizenship. She was released from the labor camps in

December 1952 in poor health.[1] Although forbidden to work, she earned money for the family by secretly teaching English and music.

During Florence's imprisonment, Marcu and his grandmother subsisted on a pension of $7 a month and the secret charity of neighbors. Children threw rocks at Marcu and shouted, "Hey you, American, stay away from us." On several occasions, Marcu was taken to the school office and questioned about which neighbors were helping them, what his grandmother was teaching him, and what his family thought about the Romanian government. During these questionings, the police continually referred to the 10-year-old Marcu and his family as Americans.

After Florence's release from prison, the family continued to live in poverty. Local police regularly searched their living quarters, looking for anti-government books, newspapers, or letters. Repeatedly removed from school and questioned by police, Marcu interrupted his education for one year to work to support the family.

Upon completing high school, Marcu applied to attend a six-year university. His application was repeatedly lost and, eventually, he was denied admission. He was told that "[w]ith your background, you don't expect to be in a college." While attending a three-year technical school, an instructor accused Marcu, in open class, of being "an enemy of the people." During these school years, he was repeatedly detained and questioned about his political leanings.

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[1] The Certificate of Release states she was convicted by the General Directory of State Security, a division of the Ministry of Internal Affairs, for the crime "Manifest against the Regime."

Most of Marcu's adult life has been filled with incidents of detentions, interrogations, and beatings — all based on his and his family's support for principles of American freedom. In 1964, Marcu and other co-workers listened to Radio Free Europe and The Voice of America at work. After being turned into police by a co-worker, Marcu was taken to the police station and beaten. He was accused of being an "enemy of the people" and an "instigator." During the next few years, Marcu and Florence were repeatedly arrested, detained, and questioned. Florence's letters to her sister, Margaret, who was living in the United States, were intercepted. Marcu later learned that Margaret wrote many letters to Florence, which she never received. In 1968, a local police officer beat and kicked Marcu for wearing U.S.-made blue jeans.

Two years later, Marcu married Carmen Nicoliscu, an architect. For the next several years, their home was searched two to three times a week. At least once a month, police detained Marcu at the police station and questioned him about listening to "subversive" radio programs, his contacts with American relatives, and his allegiance to the Romanian government. These interrogations were typically followed by Marcu being threatened with death and beaten with rifle butts.

In 1977, Marcu was arrested and detained after being accused of instigating labor strikes. For over 36 hours, he was denied food and water and repeatedly beaten. At the end of the interrogation, he was forced to write all the information he knew about his family. Later that year, Florence died.

From 1980-1983, Marcu's home was repeatedly searched. He was arrested and beaten in 1983 because he was not "acting like a good Communist."

In 1984, Carmen received a passport to travel to Florida to visit Margaret. Marcu was denied a passport. Upon arriving in the United States, Carmen requested and received

political asylum. Romanian police, upon learning of his wife's defection, went to Marcu's workplace and, in front of his co-workers, demanded that Marcu divorce her.

From 1985-1987, the harassment and persecution of Marcu escalated. Initially, he was interrogated weekly by police. They threatened to kill him if he tried to follow Carmen to the United States and pressured him to divorce her. He was beaten approximately twelve times with socks filled with sand. Although he made discreet inquiries into ways to flee Romania, he was unable to escape. Soon, the detentions and interrogations occurred almost daily.

In 1987, two employees from the U.S. Embassy — sent through the efforts of Margaret — went to Marcu's house and asked him if he wished to join his wife in the United States. Local Romanian labor officials learned of the visit in advance and threatened to kill Marcu if he said the "wrong" things. Marcu declined the offer to come to the United States because the Romanian officials were in the room during the visit. After this, Marcu gave up hope of reuniting with Carmen in the United States and divorced her in July 1987.

Soon thereafter, Marcu married Daniela Safta. For the next two years, police continued to search their house several times each week.

In December 1989, the Communist dictatorship of Nicolae Ceausescu was overthrown. In May 1990, Marcu was able to bribe a local police officer, the husband of a co-worker, to push through his application for a passport. He also applied for a U.S. visa.

The next month, police called Marcu to the local station, on the pretense that he had witnessed a car accident. He was taken into a small room where three police officers beat him with rifles until he was unconscious. He awoke in his car, at

three o'clock in the morning, in an unfamiliar part of Constanta. His legs were bruised, as if the car doors had been slammed shut on them. Blood was running down the right side of his head and ear; there was also blood in his urine. He could not find a doctor to treat him for three days. When he finally received treatment at the Constanta Municipal Hospital, a doctor diagnosed "post traumatic hematomegalie and multiple cranial injury."[2]

In September 1990, he received a U.S. visa and came to the United States with Daniela. One week after his arrival, he applied for asylum, which was denied.[3] After he and Daniela overstayed their visitors' visas, the INS issued an Order to Show Cause in November 1992. After conceding deportability, Marcu again applied for asylum and withholding of deportation. The couple's daughter, Mary, was born in the United States in April 1993.

Marcu testified in English at the hearing before the IJ in March 1994. He also submitted substantial documentary evidence supporting his asylum claim: excerpts from the Congressional Record; reports from Amnesty International, the Hungarian Human Rights Foundation, and Helsinki Watch; and various American newspaper articles.[4] Finally, Marcu's mother-in-law, Victoria Safta — who lives in Marcu's house in

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[2] Marcu produced records of this hospital visit at the hearing before the IJ.

[3] This first asylum application and the subsequent proceedings were not part of the record for our review.

[4] All of the documents offered by Marcu were accepted by the IJ as evidence.

Romania[5] — testified that police came to the house a few weeks after Marcu left and questioned her about Marcu's whereabouts and plans to return. Before her trip to the United States, she was questioned about her travel plans and warned to dissociate herself from Marcu. Victoria also reported several break-ins to the house.

The INS did not cross-examine Marcu or Victoria or present its own witnesses. In fact, counsel for the INS uttered a total of 37 words during the entire hearing.[6] The only evidence submitted by the INS was the State Department's advisory opinion and report on conditions in Romania.

II.

The majority emphasizes the standard of review, as if to explain away this draconian result. Yet despite the majority's efforts, this is not a case in which we simply applied clear, though heart-wrenching, facts to a deferential standard of review. Instead, the majority breaks new ground by elevating the State Department's country report to talismanic heights and shifting decision-making authority from the BIA to a government bureaucrat.

I agree with the majority that the issue is whether there is substantial evidence in the record to support the BIA's conclusion that the INS successfully rebutted the presumption

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[5] Marcu built this one-bedroom house in 1974 for $5,000, with $4,000 sent to him by Margaret.

[6] The INS's "advocacy" consisted of the following statements: "Isabella Bronzina for the Government"; "No, Your Honor"; "I have no questions, Your Honor. Can we have a short recess"; "No questions, Your Honor"; "I have no questions, Your Honor"; "No, Your Honor"; "No, Your Honor"; "Waived."

of future persecution.[7] Deference does not mean, however, that we must rubber-stamp every petition for review of the BIA's denial of an asylum petition. Rather, we must determine whether the Board's conclusion is "substantially reasonable" based on the record as a whole. *De Valle v. INS*, 901 F.2d 787, 790 (9th Cir. 1990).

The evidence Marcu presented is so compelling that it is hard to believe that any reasonable factfinder could fail to find a well-founded fear of persecution. The only effort exerted by the INS in this case was its introduction of the State Department's report. The State Department attached its "generalized background sheet on Romanian applications," which is a compilation of foreign service officers' reports, the annual *Country Reports on Human Rights Practices*, the annual *World Refugee Report*, and periodic *Background Notes* on each country. While we have described these annual *Country Reports* as "the most appropriate and perhaps the best resource" for "information on political situations in foreign nations," *Kazlauskas v. INS*, 46 F.3d 902, 906 (9th Cir. 1995) (internal quotations and citations omitted), we have never held, until today, that the *Country Report* for a particular country or the State Department's advisory opinion is dispositive. The majority's opinion allows the BIA to abdicate its fact-finding function by merely including a few citations and pithy quotes from the country report in its analysis.

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[7] In my opinion, it is clear that Marcu is entitled to the regulatory presumption of eligibility for asylum. See 8 C.F.R. § 208.13(b)(1)(i). The cumulative effect of multiple incidents of discrimination, harassment, and violence may constitute persecution. See *Surita v. INS*, 95 F.3d 814, 819-20 (9th Cir. 1996); see *also Gaya Prasad v. INS*, 101 F.3d 614, 617 (9th Cir. 1996) (finding of past persecution is compelled when applicant was beaten by government captors and lost job due to political activism).

Here, the Board adopted the advisory opinion's conclusion while ignoring those portions of the report that supported Marcu's claim. The report, issued in December 1993, admitted the continued existence of civil rights abuses by local authorities: "most plausible mistreatments cited by applicants are now local rather than national authority in origin," and "[o]fficial mistreatment . . . might occur in some localized circumstances." The BIA should not be free to pluck sweeping generalizations from State Department reports to support its conclusions, while ignoring specific statements in those reports that support an asylum seeker's petition.

The report also stated that Romania, "[o]nce the most repressive of the major Communist regimes," was currently led by many who "held office under the previous regime." Finally, the State Department admitted that Marcu's "connections with the United States may well have led to recurrent interest in him on the part of the authorities, particularly when his first wife did not return from a visit to this country in 1984." Taken as a whole, the advisory opinion insufficiently rebuts the regulatory presumption of future persecution to which Marcu is entitled.

The evidentiary scales tip decisively in Marcu's favor when a reasonable factfinder considers the evidence Marcu submitted.[8] Marcu introduced overwhelming documentary evidence that Romania's democratic transformation was superficial. The House of Representatives voted to deny most-favored-nation ("MFN") trade status to Romania in September 1992 in light of its civil rights abuses. Comments

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[8] We reviewed the record as it was presented to the BIA in September 1996, which consisted of news reports and State Department records issued during 1992 and 1993. Thus, we did not consider the real and lasting democratic changes that have occurred in Romania under President Emil Constantinescu's leadership.

during congressional debate were varied but presented a common theme:

> Romania represents the least change among all the countries of Eastern and Central Europe from the hated Communist dictatorships to what we have today. There is a persistent pattern of human rights violations involving all nationalities in Romania . . . . The anti-Communist revolution in Romania was hijacked by the remnants to the Romanian Communist Party, and the present leader of the country, [Ion] Iliescu, is a barely reconstructed former Communist leader . . . . [U]nder Nicolae Ceausescu, Romania was the most despicable of all Communist dictatorships, and to a very large extent the basic power structure is unchanged in Romania today . . . . [T]he Romanian revolution has been hijacked by this regime now in power. They have changed their name. They have changed their facade. But the terror goes on . . . . Romania is not a democracy. Romania does not respect human rights. Romania does not respect religious rights of any religion. It does not provide for the degree of cultural autonomy that we take for granted in any civilized society. 138 Cong. Rec. H8851 (daily ed. Sept. 22, 1992) (statement of Rep. Lantos).

> While Ceausescu is gone, vestiges of the old system do remain. Many of Romania's top leaders today held responsible party positions under Ceausescu and are not eager to discuss

their pasts; more than half of the old Securitate [secret police] still make up the police, the army, and a new agency known as the Romanian Intelligence Service. *Id.* at H8853 (statement of Rep. Wolf).

[The Romanian] government . . . is made up primarily of people who are recycled from the hated Ceausescu regime that has allied itself with the dangerous ultra-nationalist, the Romanian National Unity Party, which is the political arm of a neo-Fascist organization which has repeatedly attacked Romania's Hungarian, Jewish, and gypsy minorities. *Id.* at H8854 (statement of Rep. Atkins).

Unfortunately, [Romania] is not the democratic success like its neighbors in Hungary and Bulgaria. Serious questions remain today about the Iliescu government's commitment to democratic and economic reforms; holding genuinely free and fair elections; improving human rights and civil liberties; promoting an independent media; and placing strict, publicly accountable civilian control over the Romanian Intelligence Service — the dreaded Securitate. Actions speak louder than words. And, thus far, the actions of the Iliescu government have not been satisfactory . . . . The Romanian Intelligence Service has made limited progress to divorce itself from Dictator Ceausescu's murderous Securitate. Intimidation remains. *Id.* at H8854 (statement of Rep. Atkins).

A year later, Congress voted to extend MFN status to Romania. The Senate stated it would continue to monitor developments in Romania in light of "[r]eports from a number of human rights organizations suggest[ing] . . . there is still cause for concern and a tremendous need for improvement." 139 Cong. Rec. S15217 (daily ed. Oct. 21, 1993).

Marcu presented even more evidence. Statements from congressional representatives and reports from human rights organizations discussed the local abuse of civil rights, see *Helsinki Watch*, cited in 139 Cong. Rec. S14218 (daily ed. Oct. 21, 1993); the routine torture of detainees in police custody, see *Amnesty International*, cited in 139 Cong. Rec. S14219, S14220, *Hungarian Human Rights Foundation*, cited in 139 Cong. Rec. S14228; the lack of enforcement of civil rights, see *Helsinki Watch*, cited in 139 Cong. Rec. S14218; the intimidation and surveillance by the Romanian Intelligence Service,[9] see *Amnesty International*, cited in 139 Cong. Rec. S14221, *Hungarian Human Rights Foundation*, cited in 139 Cong. Rec. S14228, 138 Cong. Rec. H8850 (statement of Rep. Wolf), (statement of Rep. Lagomarsino); and the lack of independence of the judiciary, see *Amnesty International*, cited in 139 Cong. Rec. S14220. All of these reports post-dated Romania's democratic revolution.

The BIA dismissed all this evidence as "general in nature." Yet the evidence Marcu presented dwarfed the conclusion of the State Department's very general advisory

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[9] The State Department's report optimistically noted that a new law "has established parliamentary oversight over [the Romanian Intelligence Service] and prohibits the hiring of most former Securitate officers." However, more than half of the old Securitate continued to comprise the police, the army, and the new intelligence agency, including its director. See 138 Cong. Rec. H8853 (daily ed. Sept. 22, 1992) (statement of Rep. Wolf).

opinion. In *Kazlauskas*, we upheld the BIA's exclusive reliance on the *Country Report* when it showed that Lithuania had completely replaced its leadership personnel and had discontinued many of the Soviet practices of surveillance and control. See 46 F.3d at 906. We concluded that the *Country Report* demonstrated the applicant did not have a well-founded fear of persecution because "[t]here had been no reports of conduct by the Lithuanian authorities similar to the repressive and abusive conduct by former Soviet authorities." *Id.* In contrast, the record before us is replete with reports of continued human rights abuses in Romania.

Curiously, the majority finds the tepid support for the BIA's conclusion offered by the country report "completely consistent" with the actual state of affairs because "[t]here are no alleged abuses" of Marcu after the "chaotic first year" of Romania's democratic revolution. Maj. op. 1081. The strange thing is — Marcu left Romania during the "chaotic first year." He sustained a life-threatening beating in June 1990 and left Romania in September 1990. The fact that Marcu did not stick around during this "chaotic first year" to see if the beatings would continue should not work against his claim.

The majority ignores the only other piece of evidence upon which the Board relied — the testimony of Marcu's mother-in-law. The BIA noted that Marcu's mother-in-law currently resides in Marcu's house in Romania in relative tranquility. Thus, the Board concluded, Marcu had no reason to fear persecution in his homeland. The BIA acknowledged, however, that "Romanian government officials may have expressed some interest as to [Marcu's] current whereabouts" and that Marcu's mother-in-law has been disturbed by "brief periods of questioning by the police." The logical question is obvious: why are the Constanta police still inquiring into Marcu's whereabouts if he has nothing to fear from them upon returning to Romania?

The majority concludes that the State Department's advisory opinion "was individualized to Marcu's situation," thus satisfying our requirement that the BIA engage in an individualized analysis of the applicant's circumstances when evaluating changed country conditions. See *Osorio v. INS*, 99 F.3d 928, 932- 33 (9th Cir. 1996). The majority is wrong in two respects. Our precedent requires the BIA and IJ, not the State Department, to conduct an individualized analysis. Moreover, the State Department's letter questions the plausibility of some of Marcu's claims and challenges Marcu's opinion of the extent of political change in Romania. We must, however, accept Marcu's testimony as true because neither the IJ nor the BIA made an adverse credibility finding. See *Hartooni v. INS*, 21 F.3d 336, 342 (9th Cir. 1994). And Marcu's personal opinion on the political climate in Romania is not relevant to his asylum claim. As a whole, this letter in no way purports to analyze whether Marcu has a well-founded fear of persecution in Romania based on his membership in a particular social group, his family. The majority opinion allows the BIA to escape its evaluative function by relying on the cursory letter of a government bureaucrat.

The BIA did not engage in the "individualized analysis" of Marcu's situation in Romania that we require when analyzing changed country conditions. The Board merely cited the State Department's report and noted that Romania had overthrown its Communist dictatorship in favor of a democratically-elected government that "in general" respects civil liberties. The BIA concluded by quoting this report: "current conditions have so altered as to remove any presumption that past mistreatment under Ceausescu or in the chaotic first year after his overthrow will lead to mistreatment in the future." The BIA reasoned that because Marcu's persecution had occurred under the Ceausescu regime and in 1990, Marcu no longer faced any reasonable possibility of persecution.

The BIA's analysis does not address Marcu's claim that he has a well-founded fear of persecution from local authorities whom the national government is unable or unwilling to control. Marcu has repeatedly argued, and submitted overwhelming evidence to prove, that while the changes on the national level in Romania have been fundamental, local governments are unchanged. It was local police who primarily tormented his family for 45 years. The State Department's report simply does not rebut the presumption that Marcu has a well-founded fear of persecution from local authorities.

We have previously held that an applicant is not required to show a threat of country-wide persecution to be eligible for asylum or withholding of deportation. See *Harpinder Singh v. Ilchert*, 63 F.3d 1501, 1510 (9th Cir. 1995). Once the regulatory presumption is triggered, "the only relevant question is whether conditions in the country have so changed that the threat no longer exists upon his return," not whether the applicant's "past experience reflected conditions nationwide." *Id.*

The majority asserts that considering all the evidence Marcu presented would involve this court in resolving a factual dispute about current conditions in Romania that was properly before the BIA. Maj. op. 1081. This case is not about resolving factual disputes or reweighing the evidence. It is about holding the BIA to its job, which is to apply the appropriate regulatory presumptions and weigh the evidence as a neutral fact-finder. And it is about requiring the INS to mount at least a minimal defense when it seeks to deport an asylum-seeker with a story of decades-long persecution to the worst of the former Communist regimes. Because Marcu presented compelling evidence that he has a well-founded fear of persecution if returned to Romania, I would grant the petition.

III.

The BIA also abused its discretion in denying Marcu's asylum claim based on past persecution. The only analysis provided by the BIA was a statement that "[t]he actions were not so severe or atrocious in nature to warrant asylum for humanitarian reasons."

The BIA failed to include any analysis of why the 45-year torment of Marcu and his mother was not sufficiently severe or atrocious. See *Rodriguez- Matamoros v. INS*, 86 F.3d 158, 161 (9th Cir. 1996) (court must understand how the BIA arrived at the findings underlying its decision).

Moreover, the BIA failed to consider that the reason for the persecution of Marcu and his mother may be an independent humanitarian ground for granting asylum. See *Osorio*, 99 F.3d at 932 (*Chen* doctrine allows asylum for severe past persecution or other humanitarian reasons). Here, Marcu and his mother were not persecuted for political activism or political opinion; they were persecuted because Marcu's mother was American. Florence's loyalty to the United States — allowing the U.S. embassy to occupy her home and fly its flag over her roof — resulted in her home being confiscated and her torture and imprisonment. Marcu's story is replete with examples of persecution simply because of his connections with the United States. His first wife found political asylum in this country because she was allowed to visit *his* U.S. relatives. The Romanian government effectively forced Marcu to divorce her. The United States once offered Marcu the opportunity to seek asylum here but he declined out of fear for his life. It seems particularly cruel to deny him the opportunity now.

I respectfully dissent.

UNITED STATES DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS

MATTER OF MIRON FLORIN MARCU
In Deportation Proceedings

No. A70-046-326

September 24, 1996

Bob S. Platt, Pasadena, CA, for respondent.

Heidi L. Goebel, Asst. Dist. Counsel, for Immigration and Naturalization Service.

MARY MAGUIRE DUNNE, Vice Chairman:

The respondent appeals from the Immigration Judge's March 14, 1994, decision denying his application for asylum and withholding of deportation under sections 208(a) and 243(h) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158(a), 1253(h). The appeal will be dismissed.

The respondent is a 54-year-old native and citizen of Romania. He entered the United States as a visitor for pleasure on or about September 19, 1990, at or near New York, New York. The Immigration Judge found the respondent deportable pursuant to section 241(a)(1)(B) of the Act, 8 U.S.C. § 1251(a)(1)(B), as an alien who remained in this country longer than permitted. On appeal, the respondent argues that the Immigration Judge erred in his decision. He maintains that the evidence of record establishes his eligibility for the relief sought. In particular, he argues that he experienced sufficient past persecution as to warrant asylum on humanitarian grounds.

I. FACTS

The respondent argues that he experienced past persecution in Romania prior to coming to the United States. He testified

that the persecution occurred on account of his mother's affiliation with the United States, namely her American citizenship. In addition, his parent's home was the location of an office named the "United States legacy" until its closure in 1949. The office evidently housed an office of the United States Department of State. Upon the departure of the American presence from the respondent's home in 1949, the Romania communist government made "pressure against [his family]" (Tr. at 11).

Romania's government moved the respondent's family from the home that housed the "United States legacy" into "a small room, 10 feet by 12 feet, with no facilities, no water, no anything, only a room" (Tr. at 11). The respondent's mother refused to renounce her acquired United States citizenship and in 1950, she was arrested and imprisoned. Her jailers questioned her as to whether she was an American spy (Tr. at 14). During his mother's imprisonment, the respondent lived with his grandmother and subsisted on a pension of $7 per month and the charity of others.

The respondent testified that he suffered other acts of persecution as a result of the Romanian government's identification of his mother with the United States. In school, he experienced difficulties and was subjected to taunts by other children (Tr. at 13). Upon completion of high school, he applied for admittance to college. His application was repeatedly lost and, eventually, he was denied admission. He subsequently applied and was admitted into a technical school. At the school, a teacher accused him of being an "enemy of the people" (Tr. at 16).

Upon graduation from technical school, the respondent began his employment career. During his work hours, he listened to Radio Free Europe. The Romanian police learned of his listening habits and ordered him to appear at a local

police station. At the station, the respondent was accused of being an instigator. He was subjected to a series of beatings (Tr. at 17).

The respondent asserts that he was persecuted continuously until his departure from his homeland in 1990 (Tr. at 20). For example, in 1968, the respondent was beaten after he wore United States made jeans. In 1970, his home was repeatedly searched. He also was detained and interrogated on a series of occasions allegedly on account of his alleged subversive activities. In the early 1980s, his home was repeatedly searched. In addition, he was denied permission to visit the United States notwithstanding the fact that his first wife was permitted to emigrate to the United States in 1984 (Tr. at 19).

In 1990, after the respondent had applied for a visa to visit the United States, he was detained and beaten to the point of unconsciousness. He was told during the beating by the police that, "We take care of the enemy of the people. We take care, we shut their mouth. This means we kill them" (Tr. at 27). Even after his departure in 1990, the police still have expressed an interest in his location and actions. The respondent's mother-in-law testified that she currently resides in Romania in the respondent's house. On a few occasions, she has been approached and questioned regarding his whereabouts. She was also warned to disassociate herself from her son-in-law because of his activities (Tr. at 42). The respondent argues that he has a well-founded fear of persecution should he return to Romania.

II. APPLICABLE LAW

In order to establish eligibility for asylum, an alien must demonstrate that he or she has experienced either past persecution or has a well-founded fear of persecution on account of the alien's race, religion, nationality, membership in a particular social group, or political opinion. See section 101(a)(42)(A) of the Act, 8 U.S.C. § 1101(a)(42)(A); 8 C.F.R.

§ 208.13 (1995); see also INS v. Cardoza-Fonseca, 480 U.S. 421 (1987); Singh v. Ilchert, 63 F.3d 1501 (9th Cir. 1995); Matter of Chen, 20 I&N Dec. 16 (BIA 1989). To warrant withholding of deportation, the alien must demonstrate a clear probability of persecution. INS v. Stevic, 467 U.S. 407 (1984). The respondent bears the evidentiary burdens of proof and persuasion as to the facts and law of his case. Ghaly v. INS, 58 F.3d 1425 (9th Cir. 1995); Matter of Dass, 20 I&N Dec. 120 (BIA 1989); Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987).

Eligibility for asylum may be based on past persecution alone. Acewicz v. INS, 984 F.2d 1056 (9th Cir. 1993). Persecution can consist of a threat to the life or freedom of or the infliction of suffering or harm upon an individual in order to punish or overcome an objectionable characteristic. Matter of Acosta, 19 I&N Dec. 211 (BIA 1985), modified on other grounds, Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987). To establish eligibility on the basis of a well-founded fear of persecution, the fear of persecution must be both subjectively genuine and objectively reasonable. Ghaly v. INS, 58 F.3d 1425 (9th Cir. 1995). Both the subjective and objective components may be satisfied by credible testimony. Singh v. Ilchert, supra; see Desir v. Ilchert, 840 F.2d 723 (9th Cir. 1988).

III. CREDIBILITY

The Immigration Judge found the respondent's testimony consistent as compared with the written declaration that accompanied the application for relief (I.J. at 3, 6). An Immigration Judge's credibility finding will be given significant deference because he or she is in the best position to observe a witness's demeanor. Matter of Teng, 15 I&N Dec. 516, 518 (BIA 1975); see generally Turcious v. INS, 821 F.2d 1396, 1399 (9th Cir. 1987); Sarvia-Quintanilla v. INS, 767 F.2d

1387, 1395 (9th Cir. 1985). We find that the testimony is not so contradictory or inherently improbable as to warrant an adverse credibility finding. See generally Artiga-Turcios v. INS, 829 F.2d 720, 723 (9th Cir. 1987); Damaize-Job v. INS, 787 F.2d 1332, 1338 (9th Cir. 1986) (regarding discrediting factors).

IV. ANALYSIS

Threats, brief detention, and short interrogations, such as experienced by the respondent, are not acts of persecution within the meaning of the Act. See generally Matter of Frisch, 12 I&N Dec. 40 (BIA 1967). The alleged physical beatings of the respondent by the Romanian authorities might rise to the level of persecution. Matter of Acosta, supra. However, even if the respondent experienced persecution in Romania, he has failed to establish that he maintains a well-founded fear of persecution on account of one of the five reasons as specified in the Act. See Cardoza-Fonseca, supra.

It is the burden of the respondent to establish his eligibility for the relief sought. Matter of S-P-, Interim Decision 3288 (BIA 1996). The respondent argued that he suffered persecution in Romania on account of his nationality, religion, and political opinion. He must provide sufficient evidence, either direct or circumstantial, that a reasonable fact finder could find that the persecutor sought to inflict harm and suffering in an effort to punish or overcome a particular offensive or objectionable belief or characteristic. INS v. Elias-Zacarias, 502 U.S. 478, 483 (1992). See also Matter of R, 20 I&N Dec. 621 (BIA 1992) (Dunne, concurring in part and dissenting in part). The respondent submitted no evidence as to the claims of persecution on account of his religion or political opinion. His application focuses solely on persecution on account of his nationality.

The respondent argues that he was persecuted because he was identified as a national of the United States by Romanian authorities. Although he is a native and citizen of Romania, he maintains that he was characterized as an "American" because his mother was a United States citizen.[1] However, the respondent's claim is more properly considered as a claim of persecution on account of his membership in a particular social group, namely his family. See Matter of Fuentes, 19 I&N Dec. 658 (BIA 1988) (holding that an applicant does not need to show the exact motivation for the persecutor's actions so long as the actions would constitute persecution for an enumerated reason). A family may be considered a social group within the meaning of the Act. Sanchez-Trujillo v. INS, 801 F.2d 1571 (9th Cir. 1986); see also Gebremichael v. INS, 10 F.3d 28 (1st Cir. 1993). The respondent was beaten on account of his mother's United States citizenship, not his nationality. His relationship to his mother resulted in the removal of his family from its home, periodic searches of his household, and his having been arrested and detained. If the respondent suffered persecution in Romania, it was on account of his family membership.

If an alien establishes that he experienced past persecution on account of an enumerated factors, he is presumed to have a well-founded fear of persecution unless a preponderance of the evidence establishes that since the time the persecution occurred conditions in his homeland have changed that he no longer has a well-founded fear of being persecuted. See 8 C.F.R. § 208.13(b)(1)(i) (1995). The acts of persecution experienced by the respondent occurred while the Romanian government was under communist control, in particular, during the regime

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[1] We note that the respondent does not meet the definition of a national as set forth in section 101(a)(22)(A) of the Act, 8 U.S.C. § 1101(a)(22)(A).

of Nicolae Ceausescu. However, as reported by the United States Department of State, the Ceausescu regime was overthrown in 1989. Romania's current government is democratically elected and, in general, respects civil liberties, including freedom of speech, press, assembly, association, religion, and travel. According to the Department of State, "current conditions have so altered as to remove any presumption the past mistreatment under Ceausescu or in the chaotic first year after his overthrow will lead to mistreatment in the future" (Exhibit 3).

The record of proceedings does not indicate that a person in the respondent's circumstances would reasonably fear persecution upon returning to Romania. Although Romanian government officials may have expressed some interest as to his current whereabouts, there is little evidence to suggest that he would be subjected to persecution in his homeland. We note that his mother-in-law has resided in his Romanian home for 3 years without incident except for brief periods of questioning by the police. Moreover, the documentary evidence submitted by the respondent aid little in our analysis in that most are general in nature. In fact, some of the evidence tends to suggest that while change in Romania has been slow, it has occurred. A preponderance of evidence in the record of proceedings indicates that conditions have changed dramatically in Romania since the respondent's departure. The respondent did not establish that he possesses a well-founded fear of persecution should he return to Romania.

The respondent further argues on appeal that he warrants asylum relief notwithstanding whether he established a well-founded fear of persecution. He maintains that the persecution he experienced in Romania before fleeing to the United States merits a grant of relief on humanitarian grounds. See Matter of Chen, 20 I&N 16 (BIA 1989). However, based on the evidence at hand, we do not find sufficient humanitarian

grounds to grant the respondent asylum as a matter of discretion. The actions were not so severe or atrocious in nature to warrant asylum for humanitarian reasons.[2]

V. CONCLUSION

Accordingly, we find that the respondent has not met his burden of proof in establishing his eligibility for the relief sought. See generally Matter of Dass, supra. Inasmuch as the respondent has failed to satisfy the lower burden of proof required for asylum, it follows that he has failed to satisfy the clear probability standard of eligibility required for withholding of deportation. INS v. Stevic, supra; 8 C.F.R. § 208.16(b) (1994). We conclude therefore that the respondent does not qualify for either asylum or withholding of deportation.

ORDER: The appeal is dismissed.

FURTHER ORDER: Pursuant to the Immigration Judge's order and in accordance with our decision in Matter of Chouliaris, 16 I&N Dec. 168 (BIA 1977), the respondent is permitted to depart from the United States voluntarily within 30 days from the date of this order or any extension beyond that time that may be granted by the district director; and, in the event of failure so to depart, he shall be deported as provided in the Immigration Judge's order.

/s/ Mary Maguire Dunne

FOR THE BOARD

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[2] The respondent further argues that he was denied due process on account of the representation accorded by his prior attorney. However, we will not consider the claim in that he has not met the standard of claiming ineffective assistance of counsel before this Board. See Matter of Lozada, 19 I&N Dec. 637 (BIA 1988).

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE

Los Angeles, California

MATTER OF MIRON FLORIN MARCU
In Deportation Proceedings

No. A70-046-326

March 14, 1994

Ronald G. Parker, Fullerton, CA, for respondent.

Isabella Bronzina, General Attorney, for Immigration and Naturalization Service.

ORAL DECISION OF INGRID K. HRYCENKO, Immigration Judge:

The respondent herein is a 52-year-old, male, native and citizen of Rumania. He was brought under deportation proceedings by an Order to Show Cause, issued and served on November 20th, 1992. Through counsel, the allegations of fact were admitted, deportability conceded. Deportability is not an issue in this case.

The respondent requested an opportunity to file for asylum. This request was granted and, in accordance with Federal regulations, the State Department opinion has been procured. This opinion is not dispositive since it is this Court's responsibility to determine eligibility under the laws of the United States.

In support of his application, the respondent submitted the Form I-589, on which he states in part that he was born in

Rumania, and his religion is Orthodox, and that he arrived in the United States September 19th, 1990. He notes also, he has a wife and a U.S.C. child of 8-months-old. On the application he answers the question in the following manner as to why are you seeking asylum. "Please see attached declaration for details." However, in short, "My mother was a U.S. citizen who moved to Rumania in her teens. I was born in 1942. At the end of war [sic], my mother permitted her home to be used as a U.S. legation. After the consulate was removed in '49, my mother was imprisoned. Since that time, I have been harassed, threatened, detained, beaten and denied opportunities offered to other Rumanians. All detentions and beatings have involved my political beliefs in connection with U.S. citizens. Beatings and harassment increased after my first wife applied for, and obtained political asylum. The new government is run by the same department heads as old." And he says now that he has a U.S.C. child, he can only expect more beatings and harassment than enduring before 1990. Please see attached declaration.

He notes in answer to 21, have you or any member of your family ever been mistreated, threatened by authorities? Yes, based on religion, nationality, and political opinion. He does refer to the declaration at other instances. He notes he was issued a passport, April 6, 1990.

Attachments are also included in the application wherein he describes in more detail the historical and the political conditions as he sees them. Also, excerpts are attached of articles depicting country conditions, as well as certificates. This substantiated that his mother was born in the United States, however, any acquisition claim is nonexistent because of her early departure. There is also an attachment indicating he endured some medical treatment, dated June 20th, 1990, as well as evidence he has a Social Security card and entered legally as a visitor.

The State Department opinion and its attachment describes the country conditions and comments on the application. It is their belief that the applicant is not correct in stating that there has been no real change in the Rumanian government. They also believe his U.S. connection would not be a problem.

The respondent testified and it is noted for the record consistently to the declaration. Specifically, he related the harassment, discrimination, and incidents that occurred, in his mind, because of his connection to the United States. It is noted that his mother died in 1977 and, according to his testimony, his being singled out continued based on his relationship. He believes he was prevented from getting the education he wanted because of that tie, and he further believes that all the attacks resulted because of his relationship to his mother who was a U.S. citizen.

The respondent testified that his wife was an architect and decided to leave Rumania. Initially he used the term bored but it appears she may have left because she was worn down based on the harassment or discrimination suffered. In any event, she never returned to Rumania and, according to the respondent, did get political asylum. It is unclear why after getting political asylum in the United States, she would not petition for her husband. However, a separation existed and was never cured.

The respondent testified that he met someone else and married, Daniela, who's about 30-years-old, and they have a child. He testified he met her after his first wife left Rumania.

A mother-in-law was presented who is visiting her daughter and son-in-law in the United States for a duration of time only. She has testified that she will go back to Rumania, and that she also stays at the home of her son-in-law for security reasons. She owns another home with her husband and their son and it is hoped if the son marries, then the house of the son-in-law can be used as a residence.

The mother-in-law testified that people still questioned her and come to the home of her son-in-law, wishing to find out the [sic] whereabouts and what is going on. She also testified that they talk badly about him and how he brings shame on Rumania and, when they learned that she was visiting, she was warned not to do the same.

The mother-in-law also said that she was sorry at first that her daughter left for the United States, but does believe things are better here, and in a quaint translation of a possible idiom, she does not think that things change, only the hat changes. The mother-in-law did testify that she knew about her son-in-law's background and connections with the United States.

The respondent also testified the reason he did not come to the United States earlier was because he was denied permission to leave. He also testified that in 1987, apparently because of pressure by Aunt Margaret to the U.S. Embassy, two employees visited and tried to coax him into coming to the United States. He says that someone, however, from the work place was there and he decided not to show interest. Aunt Margaret apparently lives in Florida, and is 92-years-old.

The respondent also testified that a trumped up message was given to him that somebody was harmed or that a car accident occurred and when he did report he was beaten and presumably that medical report originated at that time, although it's unclear from the record.

The respondent has the burden to show that he is eligible for the relief requested. In writing, he says he believes he's eligible based on religion, nationality, and political opinion. Nothing has been substantiated to show any religious problem or, for that matter, political opinion. What it may be if believed, is because of the mother being a United States citizen and the problems that she endured, and thereafter, the U.S.

legation being in the house, at the largest house in Constanta at the time.

The respondent has to show that his evidence is credible, that it is plausible, and that a reasonable person would believe that persecution has occurred or will occur upon his return. The declaration is consistent with the testimony.

Based on the documentation submitted and the testimony, I cannot find that he has met the burden to show that persecution would occur or has occurred. I do find, based on believing him as to his historical recitation that harassment, discrimination, has occurred. However, he worked through all those adversities. After his mother was pushed out of the elegant or elaborate home, he was trained and educated and had a good position to the point of buying his own home which the mother-in-law indicated is very expensive. He also said he has very valuables [sic] in his home and had nodded in the affirmative as to tapestry or cloisonne and items of that kind.

Whatever caused his ex-wife to leave in 1984, started the seeds in his mind. The visits in '87, the pressure from Aunt Margaret to come to the United States, and the new marriage were factors that probably influenced him. Although it is suggested that the final beating, or alleged beating, that occurred in June, 1990 may have been the final decisive factor, the application shows he procured his passport and it was issued April, 1990.

I cannot on this record find that the stringent test that Congress has said that has to be met, has been met, as to persecution. Also it is highly peculiar that a relative as close as the mother of his wife can come and visit and the authorities know apparently, because they have warned her not to cause shame, and she has no intention of remaining in the United States, but is returning to Rumania.

The respondent has requested voluntary departure. There's nothing derogatory in the record, and I will grant the relief requested of six months, to leave on or before December, 14th, 1994 or any extension beyond such date that may be granted by the District Director.

ORDER

IT IS HEREBY ORDERED that the application under Section 208(a) and 243(h) be denied.

IT IS FURTHER ORDERED that he be granted the privilege of voluntary departure as stated, on or before December 14th, 1994. If he chooses not to leave, it will become a deportation order to Rumania.

INGRID K. HRYCENKO,
Immigration Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MIRON FLORIN MARCU, Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

No. 96-70881.

August 13, 1998.

Before WALLACE, TROTT, and HAWKINS, Circuit Judges.

ORDER:

A sua sponte request for an en banc vote in this case has been received. The parties are directed to file simultaneous briefs setting forth their respective positions on whether the case should be reheard en banc. The briefs are to be no more than twenty-five (25) pages in length and shall be filed within twenty-one (21) days from the date of this order. Forty (40) copies of the briefs shall be filed.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MIRON FLORIN MARCU, Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

No. 96-70881.

October 22, 1998.

Before WALLACE, TROTT, and HAWKINS, Circuit Judges.

ORDER:

A judge of this court made a sua sponte request for an en banc vote in this case pursuant to General Order 5.4.c. A majority of the nonrecused active judges voted against en banc consideration of this case. Judge Hawkins voted to grant and accept.

The mandate shall issue forthwith.

United States Department of State Advisory Opinion and Country Report on Romania

United States Department of State

Washington, D.C. 20520

January, 31, 1994

NAME: MARCU, Miron Florin
A #: 70 046 326
COUNTRY of BIRTH or NATIONAL of ROMANIA

Executive Office for Immigration Review
Office of the Immigration Judge
P.O. Box 711
Los Angeles, California 90053

Dear Immigration Judge:

In response to your letter asking for an advisory opinion on the above applicant's request for asylum, we have the following observations.

Our records indicate that in our communication of August 13, 1992 to the INS we had no additional analysis in this case as then presented. A copy of our generalized background sheet on Romanian applications is enclosed for your possible background use.

The applicant's connections with the United States may well have led to recurrent interest in him on the part of the authorities, particularly when his first wife did not return from a visit to this country in 1984. However, the applicant received a good education and employment, his last position stretching

from 1980 until he left Romania, and his wife was permitted to go to the U.S. in 1984. Such considerations do not comport with the applicant's depiction of himself as a constant target of official harassment, for they would not have been possible for someone in serious troubles with the authorities.

The applicant is not correct in stating that there has been "no real change in the Romanian Government" since he left. He is also incorrect in stating that his U.S. connections would be a basis for retribution against him. We see no reason why the applicant could not reside tranquilly in Romania.

These observations are based on our analysis of country conditions and other relevant factors, plus an evaluation of the specific information provided in the application. We do not have independent information about this applicant. Should you believe that any such additional information warrants further consideration, we will be happy to review the file again.

Sincerely,

Roger Dankert, Director
Office of Asylum Affairs
Bureau of Human Rights and
Humanitarian Affairs

United States Department of State
Washington, D.C. 20520
Bureau of Human Rights
and Humanitarian Affairs
December 9, 1993

ROMANIA-COUNTRY CONDITIONS AND COMMENTS ON ASYLUM APPLICATIONS

INTRODUCTION

These comments are provided by the State Department for use by the Executive Office of Immigration Review and the Immigration and Naturalization Service in assessing asylum claims. In accordance with requests made under 8 CFR 208.11, the State Department may provide information on country conditions to help adjudicators assess the accuracy of asylum applicants' assertions about country conditions and their own experiences; likely treatment were the applicants to return; whether persons similarly situated are known to be persecuted; whether grounds for denial are known to exist; and other information deemed relevant. These comments are written by experienced Foreign Service Officers with area expertise and are based on a review of asylum applications and reports from US missions abroad and other information available to the USG. Other relevant information from the Department of State, incorporated herewith by reference, includes the annual Country Reports on Human Rights Practices, the annual World Refugee Report and periodic Background Notes on each country.

OVERVIEW OF RECENT DEVELOPMENTS

Once the most repressive of the major Communist regimes, Romania has been profoundly transformed since the overthrow of the dictator Ceausescu in 1989. Changes in Romania have been fundamental, and the country has avoided the explosion of ethnic difficulties affecting other parts of the Balkans. Despite solid progress in human rights, however, the country's dismal and still falling economy, the psychological legacy of earlier repression, and internal ethnic strains still impel large numbers of Romanians, most frequently young people, to seek economic opportunity and a better life in Western Europe or North America. Recently, several European countries which use the "safe country of origin" concept seem to be treating Romania as such a country, (allowing for the possibility for this presumption to be rebutted in individual cases). Romania acceded to the Refugee Convention and Protocol in 1991.

1992's successful national elections marked an important step in assuring Romanians full protection of their rights--a continuing but sometimes halting process. The country continues to struggle with the political, economic, and social pressures produced by its transition from a totalitarian and centralized state to a democracy with a free market economy. However, civil liberties, including freedom of speech, press, assembly, association, religion, and travel are respected. Anti-Communist sentiments cited by many applicants place them now well within the democratic mainstream of political opinion and activity--which has vehemently rejected the Communist past. Some Romanians are suspicious of their leaders, many of whom held office under the previous regime. There is also concern about the rise of nationalist sentiment in some quarters and charges of discrimination -- in some cases confirmed -- by

individuals and local officials against ethnic minorities such as Hungarians and Gypsies.

A new law governing the Romanian Intelligence Service (SRI), heir to the justly-hated Securitate of the Ceausescu era, has established parliamentary oversight over that organization and prohibits the hiring of most former Securitate officers. The old Securitate files have been turned over the SRI, which is to keep them within its own archives for 40 years, after which they are to be made public. Allegations of surveillance and occasionally of intimidation and harassment of journalists and political activists have decreased. A view of recent developments as being the product of conspiracies of former Communists is popular in Romania but cannot be substantiated.

CLAIM ANALYSIS, COUNTRY CONDITIONS AND TREATMENT OF SIMILARLY-SITUATED PERSONS

Most frequently cited by Romanian asylum applicants are concerns that their past political activities or beliefs risk retribution from unreconstructed authorities who are alleged to be still in control and awaiting an opportunity to take repressive action. A second group of claims, sometimes overlapping with the first, is that the person is subject to discrimination for belonging to a minority, most often the ethnic Hungarian minority.

In our view, current country conditions have so altered as to remove any presumption that past mistreatment under Ceausescu or in the chaotic first year after his overthrow will lead to mistreatment in the future. We would also note that most plausible mistreatments cited by applicants are now local rather than national authority in origin and can be averted by internal relocation or by recourse to the nascent democratic legal structures rather than by recourse to seeking political

asylum abroad. Most Romanians have a difficult task in plausibly establishing that they would face severe and targetted [sic] mistreatment upon return to their country.

The State Department's Country Reports on Human Rights Practices for 1992 describes the Romanian situation on pages 876-884. In the months following that report, the human rights situation has continued to improve and there has been further progress in improving the status of minorities, particularly that of the ethnic Hungarians -- diplomatically, with the Government of Hungary, and domestically, with the party that claims to represent ethnic Hungarians. A National Minorities Council was established this spring.

Members of ethnic minorities provide a substantial number of asylum applicants. Ethnic Hungarians (largely from Transylvania) saw the overthrow of Ceausescu as a chance to reverse his forced assimilation policies. The 1990 Tirgu Mures riots marked the low point between separatists and government supporters. The situation has improved, although Romanian nationalist forces, for example in the city of Cluj, have created tensions.

As discussed in our Country Reports, Romanies, or Gypsies, face strong social hostility and some economic discrimination. Official mistreatment would be inconsistent with government policy but it might occur in some localized circumstances. There have been no reports of ill treatment from the thousands of Romanies recently repatriated from Germany who had been judged to be economic migrants. In the past a number of applicants have claimed to be Gypsies, without credible foundation, in order to benefit from this as a potential ground.

As noted above, most Romanian claims cite past mistreatment, either under the Communist regime and/or during the first year the post-Ceausescu period. Participation in demonstrations in 1990 (particularly those forcibly broken up by the miners, possibly with official connivance) occasioned episodic crackdowns by the authorities. The Ceausescu regime was often cruel and arbitrary, and families of persons who managed to go to the West often suffered as a result. On the other hand, those who prospered (or whose close relatives prospered) in terms of education, job and travel clearly were not in trouble with the authorities.

Many applicants cite signing the Timisoara Proclamation or demonstrating for democracy as grounds for fear of bringing about retribution. Such claims usually are based on experiences of what appears in the aggregate to be relatively randomly applied mistreatment by the police or miners. With democratization such sentiments would earn the approbation of the vast majority of the body politic. Adjudicators reviewing past mistreatment can reasonably expect that applicants could have documentation or ready access to documentation concerning judicial punishment, military and employment records and other civil documents.

OTHER FACTORS

Romania had a net outward migration for all purposes of 3 persons per thousand, or a total of about 70,000 persons in 1992, according to US Census Bureau information. Ethnic Romanians constitute 89.1% of the population; ethnic Hungarians 8.9%; ethnic Germans 0.4%; Ukranians, Serbs, Croats, Russians, Turks and Gypsies together 1.6%.

We are not aware of any stigma or punishment for asylum applicants who return, voluntarily or otherwise. Romania has

agreed to readmission agreements for the return of rejected Romanian asylum claimants with some Europea [sic] countries. Our Embassy in Bucharest has reported that a number of Romanians have abandoned U.S. refugee status and returned to Romania, often to claim property or to arrange for relatives to join them in the U.S.